

## WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW Washington, DC 20006-1238 Tel: 202-303-1000 Fee: 202-303-2000

March 25, 2010

FILED/ACCEPTED

#### **VIA HAND DELIVERY**

MAR 25 2010

Marlene H. Dortch Federal Communications Commission Office of the Secretary 445 Twelfth Street, S.W. Washington, D.C. 20554 Federal Communications Commission.
Office of the Secretary

Re:

In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56

Dear Ms. Dortch:

On behalf of Comcast Corporation, General Electric Company, and NBC Universal, Inc. (collectively "Applicants"), and in accordance with the First and Second Protective Orders adopted in this proceeding, enclosed please find the original and four copies of Applicants' objection to the disclosure of Applicants' Confidential and Highly Confidential Information to Matthew M. Polka, the President and Chief Executive Officer of the American Cable Association ("ACA"), and Ross J. Lieberman, ACA's Vice President of Government Affairs. Pursuant to the Protective Orders, Applicants are also serving Messrs. Polka and Lieberman and their outside counsel via email and overnight delivery.<sup>2</sup>

Respectfully submitted,

Michael Hammer / BCB

Counsel for Comcast Corporation

<sup>&</sup>lt;sup>2</sup> First Protective Order ¶ 7; Second Protective Order ¶ 4.



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See In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56, Protective Order, DA 10-370 (Mar. 4, 2010) ("First Protective Order"); In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56, Second Protective Order, DA 10-371 (Mar. 4, 2010) ("Second Protective Order").

Marlene H. Dortch March 25, 2010 Page 2

### Enclosures

ce: William T. Lake William D. Freedman

Jessica Almond Jennifer Tatel James R. Bird

# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Comcast Corporation,	)	MB Docket No. 10-56
General Electric Company	)	
and NBC Universal, Inc.	)	
	)	
For Consent to Assign Licenses or	)	
Transfer Control of Licensees	)	

To: Chief, Media Bureau

# JOINT OBJECTION TO DISCLOSURE OF CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION

Pursuant to the First Protective Order<sup>1</sup> and the Second Protective Order<sup>2</sup> in the above-captioned proceeding, Comcast Corporation ("Comcast"), General Electric Company, and NBC Universal, Inc. ("NBCU") (collectively "Applicants") hereby jointly object to the disclosure of Applicants' Confidential and Highly Confidential Information to Matthew M. Polka, the President and Chief Executive Officer of the American Cable Association ("ACA"), and Ross J. Lieberman, ACA's Vice President of Government Affairs. While Applicants hold Messrs. Polka and Lieberman in high regard and appreciate their zealous advocacy for the interests of their trade association members, Applicants are lodging this objection because of the critical importance of strict compliance with the Protective Orders.

In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56, Protective Order, DA 10-370 ¶ 7 (rel. Mar. 4, 2010) ("First Protective Order").

In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56, Second Protective Order, DA 10-371 ¶ 4 (rel. Mar. 4, 2010) ("Second Protective Order").

On March 22, 2010, Applicants received signed Acknowledgments pursuant to the First and Second Protective Orders from Mr. Polka.<sup>3</sup> Applicants received signed Acknowledgments from Mr. Lieberman pursuant to both Protective Orders on March 24, 2010.<sup>4</sup> Applicants also received Acknowledgments from three of ACA's outside attorneys and ACA's outside expert.

The First Protective Order limits access to Confidential Information to Outside Counsel, In-House Counsel (provided that such counsel are not involved in competitive decision-making), and Outside Consultants and Experts (who are similarly disallowed if they are involved in competitive decision-making). The Second Protective Order limits access to Highly Confidential Information to Outside Counsel and Outside Consultants and Experts (with the same restriction regarding competitive decision-making). The Second Protective Order elaborates that the "competitive decision-making" restriction requires that an attorney's or expert's "activities, association, and relationship with a client do not involve advice about or participation in the business decisions of the client or any competitor of a Submitting Party nor the analysis underlying the business decisions."

As discussed further below, Mr. Polka and Mr. Lieberman are not Outside Counsel or Outside Consultants within the meaning of the Protective Orders. Given his role as the head of an industry trade association, Mr. Polka is not In-House Counsel under the First Protective Order. Similarly, Mr. Lieberman has not made the requisite showing that he qualifies as In-

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See Exhibit 1 (Mr. Polka's Acknowledgments).

See Exhibit 2 (Mr. Lieberman's Acknowledgments).

First Protective Order ¶¶ 4, 10.

Second Protective Order ¶ 3.

Second Protective Order ¶ 5. The First Protective Order uses nearly identical language. See First Protective Order ¶ 4.

House Counsel. Therefore, Messrs. Polka and Lieberman are not eligible to access Applicants' sensitive Confidential and Highly Confidential Information. The Commission has denied individuals access under similar circumstances.<sup>8</sup>

Neither Mr. Polka nor Mr. Lieberman is Outside Counsel within the meaning of the Protective Orders. Both the First and Second Protective Orders define Outside Counsel as "the firm(s) of attorneys, or sole practitioner(s), as the case may be, representing a party in this proceeding, provided that, the Outside Counsel of Record is not involved in competitive decision-making." Messrs. Polka and Lieberman are not attorneys at a law firm or sole practitioners. ACA is represented by Cinnamon Mueller and Kelley Drye & Warren LLP in this proceeding. Three attorneys from these two firms have filed Acknowledgments on behalf of ACA, and Applicants have no objections to their access to protected materials. 10

Nor do Messrs. Polka and Lieberman qualify as Outside Consultants or Experts. The Second Protective Order provides that protected information may be disclosed to "consultants or experts retained for the purpose of assisting Counsel or a party in this proceeding, provided that

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Cf. In the Matter of GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee for Consent to Transfer of Control, Order Ruling on Joint Objections, 14 FCC Rcd 3364 ¶ 2 (1999) (denying access to protected documents to a vice president of regulatory affairs and a state director of a company because it was likely they provided advice and participated in the formulation of "business decisions regarding compliance with state and federal regulations" for the company) ("GTE"); In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., Order Ruling on Joint Objections, 13 FCC Rcd 13478 ¶ 2 (1998) (denying access to protected documents to two senior vice presidents of a company who had not explained their roles in the company, and one of whom was actively involved in the strategic management of the company) ("MCI").

First Protective Order ¶ 4. The Second Protective Order uses nearly identical language: "Outside Counsel of Record' or 'Outside Counsel' means the firm(s) of attorneys, or sole practitioner(s), as the case may be, representing a party in these proceedings, provided that such persons are not involved in competitive decision-making." Second Protective Order ¶ 5.

Applicants have today sent via overnight mail copies of the requested Confidential and Highly Confidential Information to these counsel.

the Outside Consultants are not involved in competitive decision-making."<sup>11</sup> As the head of ACA, Mr. Polka is not assisting ACA's Outside Counsel in this proceeding but rather is their client. He is not assisting a party in this proceeding but rather is the President and CEO of a party. Similarly, Mr. Lieberman is an executive employee of a party in the proceeding and cannot stand in the shoes of an expert or consultant assisting Outside Counsel or a party.

Nor does Mr. Polka qualify for access to Confidential materials under the First Protective Order as In-House Counsel. Mr. Polka is the President and CEO of ACA and has made no showing that he functions in an attorney-advisor capacity with respect to his organization.

Indeed, it is highly unlikely that any court would find that the President and CEO of an organization could be considered that organization's in-house counsel. 12

Even if Mr. Polka could be considered ACA's in-house counsel in certain capacities beyond the scope of this proceeding, he is nonetheless barred under the First and Second Protective Orders because, as the President and CEO of ACA, his primary role is to advance the interests of ACA's membership. ACA is composed of member companies, virtually all of whom directly negotiate and/or compete with Comcast and/or NBCU.<sup>13</sup> ACA's Board of Directors (to

Second Protective Order ¶ 5. The First Protective Order defines outside consultants as: "outside consultants or experts retained for the purpose of assisting Counsel in this proceeding, provided that, the outside consultants or experts are not involved in the analysis underlying the business decisions of any competitor of any Submitting Party nor participate directly in those business decisions." First Protective Order ¶ 10.

Courts most commonly address this issue in the context of the attorney-client privilege. See, e.g., Boca Investerings Partnerships, et al. v. United States, 31 F. Supp. 2d 9, 12 (D.D.C. 1998) ("There is a presumption that a lawyer in the legal department or working for the general counsel is most often giving legal advice, while the opposite presumption applies to a lawyer . . . who works for the Financial Group or some other seemingly management or business side of the house."); see also Avianca, Inc. v Corriea, 705 F. Supp. 666, 675-76 (D.D.C. 1989) (holding that communications involving a corporation's president and chairman, who was also the corporation's attorney, were not privileged because they were not shown to be for the purpose of legal rather than business advice); see generally 1 Paul R. Rice, Attorney-Client Privilege in the United States §§ 7.29-7.30 (2d ed. Supp. Mar. 2009); 12 Bender's Forms of Discovery Treatise § 5.02 (Matthew Bender & Co., Inc. 2009).

ACA describes itself in a March 11, 2010 press release as "a trade organization representing nearly 900 smaller and medium-sized, independent cable companies who provide broadband services for more than 7 million cable subscribers primarily located in rural and smaller suburban markets across America." See

whom Mr. Polka presumably reports) is similarly composed of executives of companies that directly negotiate and/or compete with Comcast and/or NBCU.<sup>14</sup> Mr. Polka is therefore "involved in competitive decision-making" within the meaning of the First and Second Protective Orders.<sup>15</sup> Disclosure of Applicants' Confidential materials to Mr. Polka would "pose an unacceptable opportunity for inadvertent disclosure" to Applicants' competitors.

Mr. Lieberman has not made the requisite showing that he qualifies as ACA's In-House Counsel. It is unclear to Applicants whether or not Mr. Lieberman, as Vice President of Government affairs for ACA, functions as an attorney-advisor with respect to his organization. However, should Mr. Lieberman establish that he is In-House counsel within the meaning of the First Protective Order, Applicants will withdraw their objection to Mr. Lieberman's access to Confidential Materials.

For the foregoing reasons, Applicants request that the Media Bureau deny Messrs. Polka and Lieberman access to Applicants' Highly Confidential and Confidential materials submitted pursuant to the First and Second Protective Orders in this proceeding. This will not prejudice in any way ACA's ability to participate fully in this proceeding since, as noted, four other individuals representing ACA have signed the Acknowledgments for both Protective Orders. Granting this request would merely preserve the limitations established by the Protective Orders regarding access to Confidential and Highly Confidential Information.

http://www.americancable.org/government\_affairs\_press\_releases\_0/feed. ACA also includes many "associate members" who directly compete and/or negotiate with Comcast and/or NBCU. See <a href="http://www.americancable.org/aca">http://www.americancable.org/aca</a> associate members.

See http://www.americancable.org/about\_us/aca\_overview/list\_aca\_board\_directors.

For similar reasons, neither Mr. Polka nor Mr. Lieberman qualifies as "Outside Counsel" who "represent[] a non-commercial party in these proceedings." See Second Protective Order ¶ 5.

GTE  $\P$  2; MCI  $\P$  2.

#### Respectfully submitted,

Michael H. Hammer 1898

Michael H. Hammer WILLKIE FARR & GALLAGHER LLP 1875 K Street, NW Washington, DC 20006 (202) 303-1000 Counsel for Comcast Corporation

A. Richard Metzger, Jr.

LAWLER, METZGER, KEENEY & LOGAN, LLC

2001 K Street, NW, Suite 802

Washington, DC 20006

(202) 777-7700

Counsel for General Electric Company

David H. Solomon

WILKINSON BARKER KNAUER, LLP

2300 N Street, NW, Suite 700

Washington, DC 20037

(202) 783-4141

Counsel for NBC Universal, Inc.

#### CERTIFICATE OF SERVICE

I, Brien C. Bell, hereby certify that on March 25, 2010, copies of the attached Joint Objection to Disclosure of Confidential and Highly Confidential Information were served by overnight delivery and electronic mail to the following.

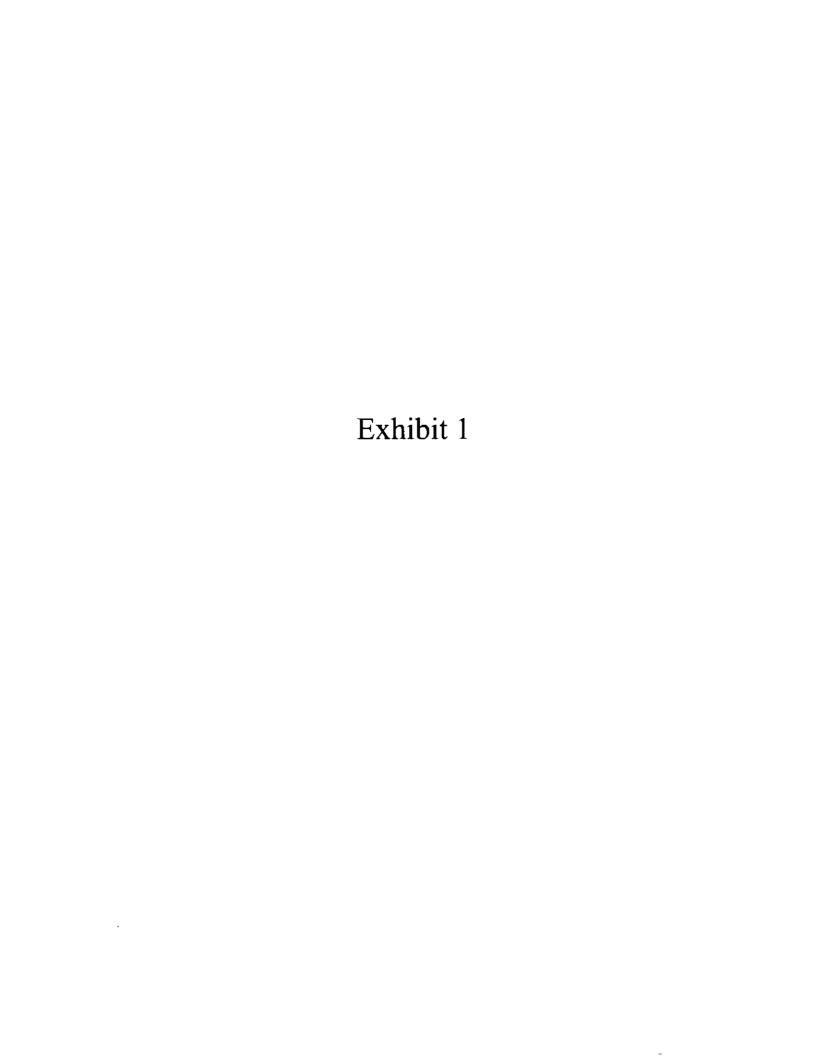
Matthew M. Polka President and CEO American Cable Association One Parkway Center, Suite 212 Pittsburgh, PA 15220-3505 (412) 922-8300

Ross J. Lieberman Vice President of Government Affairs American Cable Association One Parkway Center, Suite 212 Pittsburgh, PA 15220-3505 (412) 922-8300

Christopher C. Cinnamon Cinnamon Mueller 307 N. Michigan Ave., Suite 1020 Chicago, 1L 60601 (312) 372-3930

Thomas Cohen Kelley Drye & Warren LLP 3050 K St. NW Washington, DC 20007 (202) 342-8518

Sin C. Bell
Brien C. Bell



#### Acknowledgment of Confidentiality

#### MB Docket No. 10-56

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding, and I understand it. I agree that I am bound by the Protective Order and that I shall not disclose or use Stamped Confidential Documents or Confidential Information except as allowed by the Protective Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Protective Order is due solely to my capacity as Counsel or consultant to a party or other person described in paragraph 4 of the foregoing Protective Order and that I will not use such information in any other capacity, nor will I disclose such information except as specifically provided in the Protective Order.

I hereby certify that I am not involved in "competitive decision-making" as that term is used in the definition of In-House Counsel in paragraph 4 of the Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Stamped Confidential Documents and Confidential Information are used only as provided in the Protective Order; and (2) Stamped Confidential Documents are not duplicated except as specifically permitted by the terms of the Protective Order.

I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Stamped Confidential Documents or Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed at Pristage . DA

[Name] MATHER IN POURA

[Position] PACT/CEO - ACA
[Address] Str 212, one Pakhan Conter, Pakhan PA 15220-3505
[Telephone] 412-422-6500 Kin

#### Acknowledgment of Confidentiality

#### MB Docket No. 10-56

I hereby acknowledge that I have received and read a copy of the foregoing Second Protective Order in the above-captioned proceeding, and I understand it. I agree that I am bound by the Second Protective Order and that I shall not disclose or use Stamped Highly Confidential Documents or Highly Confidential Information except as allowed by the Second Protective Order. I acknowledge that a violation of the Second Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Second Protective Order is due solely to my capacity as Outside Counsel or Outside Counsel of Record or Outside Consultant to a party or other person described in paragraph 12 of the foregoing Second Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Second Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Stamped Highly Confidential Documents and Highly Confidential Information are used only as provided in the Second Protective Order, and (2) Stamped Highly Confidential Documents are not duplicated except as specifically permitted by the terms of the Second Protective Order, and I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Stamped Highly Confidential Documents or Highly Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Second Protective Order.

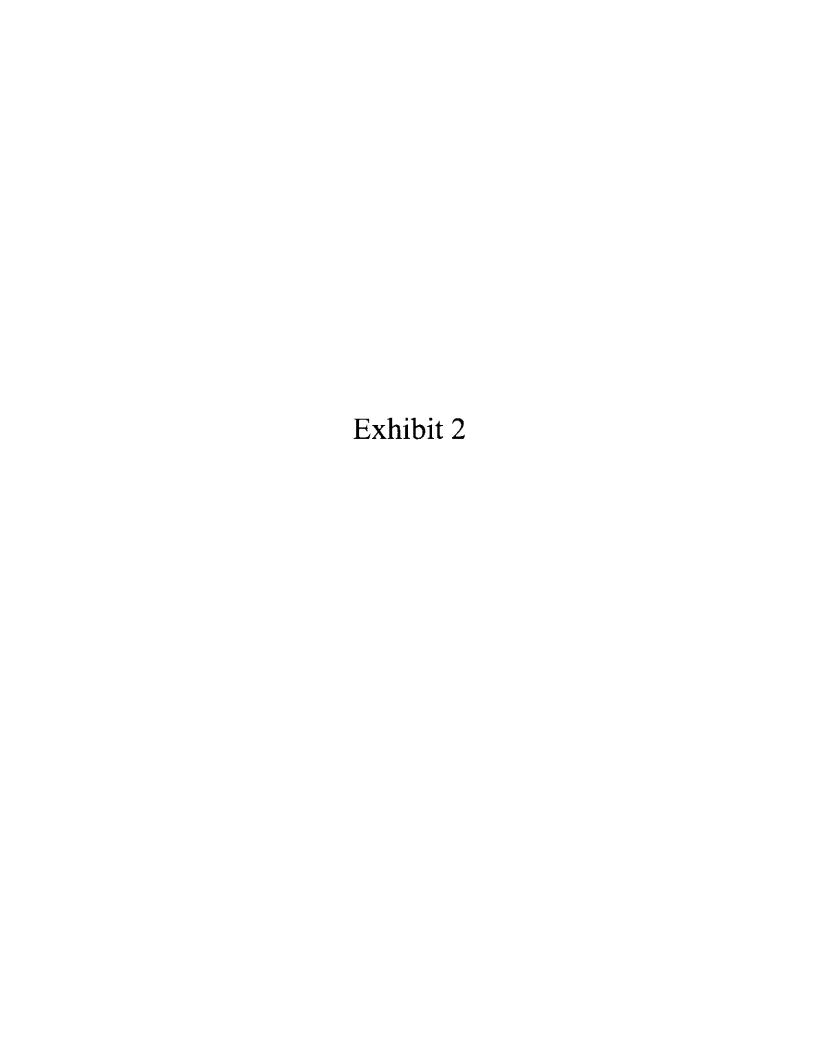
Executed at Petisbungu PA this Mit day of MANCH , 2010

[Name] MARITEN M. POUCA

[Position] Mes/CED - MEA

[Address] AL. 212, One Pollumy Cir. A (Robyt, PA (S 220 - 550 S)

[Telephone] 4(2-422-8300 X14



#### Acknowledgment of Confidentiality

#### MB Docket No. 10-56

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I hereby certify that I am not involved in "competitive decision-making" as that term is used in the definition of In-House Counsel in paragraph 4 of the Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Stamped Confidential Documents and Confidential Information are used only as provided in the Protective Order; and (2) Stamped Confidential Documents are not duplicated except as specifically permitted by the terms of the Protective Order.

I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Stamped Confidential Documents or Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

American Cable Association 2415 3714 PT NW Executed at Washington, DC 2007 this 21 day of March

[Name] Ross Lieberman
[Position] Vice President of Government Affairs, ACA
[Address] 2415 29th 11 NW, Washington, DC 20007

[Telephone] 101-444-5661

#### Acknowledgment of Confidentiality

#### MB Docket No. 10-56

I hereby acknowledge that I have received and read a copy of the foregoing Second Protective Order in the above-captioned proceeding, and I understand it. I agree that I am bound by the Second Protective Order and that I shall not disclose or use Stamped Highly Confidential Documents or Highly Confidential Information except as allowed by the Second Protective Order. I acknowledge that a violation of the Second Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Second Protective Order is due solely to my capacity as Outside Counsel or Outside Counsel of Record or Outside Consultant to a party or other person described in paragraph 12 of the foregoing Second Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Second Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Stamped Highly Confidential Documents and Highly Confidential Information are used only as provided in the Second Protective Order; and (2) Stamped Highly Confidential Documents are not duplicated except as specifically permitted by the terms of the Second Protective Order, and I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Stamped Highly Confidential Documents or Highly Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Second Protective Order.

American Coble Association
2415 2970 91 NM

Executed at Washington, DC 20007 this 21st day of March 2010.

Name Ress Liebsiman

[Position] Vice Merident of Curument Affairs, ACA [Address] 2415 39th of the Washington, DC 2000]

[Telephone] 2 0>- 454-5661